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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1949

No. [redacted] 56

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,
Petitioner,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

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No.

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Petitioner,

VS.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable The Supreme Court
Of The United States:

The petitioner, Sarah O'Donnell, Administratrix of the Estate of William O'Donnell, Deceased, respectfully petitions this Honorable Court as follows:

1. To review the judgment of the Court of Appeals for the Seventh Circuit in the above case, which judgment was entered on December 27, 1948, and became final upon the denial by that court of petitioner's application for a rehearing on January 22, 1949 (R. 252, 253).*

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* Where the letter R. appears, we refer to the page of the printed Transcript of Record.

2. For a Writ of Certiorari to the Court of Appeals for the Seventh Circuit, for that purpose.

In this behalf, petitioner shows:

I.

Opinion Below.

The opinion delivered in the court below is reported at 171 F. 2d. 973; it will also be found at R. 243-251.

II.

Summary and Short Statement of the Matter Involved.

This is an action brought under the Employers' Liability Act and the Safety Appliance Act to recover for the wrongful death of William O'Donnell, petitioner's decedent. He came to his death on the night of January 9th, 1946, during switching movements, while making up a train on track 5 in the Kirk yard of the defendant at Gary, Indiana. The facts are undisputed, and the jury were instructed as a matter of law that the Employers' Liability Act was applicable (R. 186). Mr. O'Donnell left surviving his widow, the petitioner, and four minor children (R. 116).

There were no eye-witnesses to the fatal accident. The decedent, a member of a switching crew, had told his brother, the conductor, a few minutes before, that he intended to adjust the couplers at two openings between the cars standing on track 5 (which had previously failed to couple by impact) so that they later could be coupled. The more westerly opening or gap extended east approximately 45 feet from a safety sign lying between the rails of track 5; at the east end of this opening was a standing car, and next to that a smaller opening. Shortly after

this conversation (two to four minutes), during an eastward movement on the lead track a coupler on the west end of the second car from the east broke in two because of an apparently old fracture (R. 92, 47) permitting these two cars to run wild; they impacted against certain cars standing the lead which were propelled against the cars on track 5, where decedent had announced his intention of working, and moved these cars a sufficient distance to close the openings and, incidentally, to couple the cars (which could not have occurred had the decedent not adjusted the couplers at the openings). Decedent was not seen alive from the time he started walking toward track 5 for the purpose stated. After the cars were pulled out to the east his body was found lying across the north rail of track 5 against the rail, his right arm over it and severed; a fresh chip had been knocked out of the safety sign and drag marks between the rails extended from the sign a distance of about 45 feet eastwardly to the point where the body was found. His lantern was found at the safety sign with its handle severed. Foot marks (R. 52, 54, 106, 107) were also found there which, in conjunction with the brush marks, proved almost conclusively that decedent had just adjusted the coupler at the west end of the westerly opening and was in the center of the track at that point when he was run over and killed.

The complaint charged general negligence (R. 5) and a violation of the Safety Appliance Act in that the coupler in question was so defective and insecure that it broke loose from the car to which it was attached (R. 13).

The factual contention of the defense was that instead of being killed on the movement when the coupler was broken, decedent might have been killed by a later movement on that same track, when the cars standing on it

were pulled out. This defense is not supported by any probative evidence or legitimate inference. It is pure speculation. It was, however, the only question in the case which could properly have been submitted to the jury. The defendant also contended that the Safety Appliance Act was not applicable, and that the plaintiff could not recover unless it appeared that the defendant had failed to use ordinary and reasonable care with respect to the coupler.

The plaintiff requested that the court charge that the maintenance of the car with a coupler which broke on an ordinary movement was a violation of the Safety Appliance Act, and was therefore negligence *per se*. This request the court refused (R. 193, 194).

In lieu of such request, the court charged the jury in the language of the Safety Appliance Act, leaving it to them to determine whether the breaking of the coupler was a violation of that Act (R. 186, 188).

The court, over plaintiff's objection, permitted counsel for the defendant to argue to the jury that the only duty the railroad owed, with respect to its couplers, was the duty of ordinary care, and that if the couplers coupled automatically by impact there was no violation of the Safety Appliance Act, although the coupler broke (R. 158, 159). Counsel also argued (R. 156) that plaintiff was required to prove that decedent's death resulted from the fault or negligence of the railroad company.

In instructing the jury, the court charged them as follows (R. 189):

> "Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of these three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have

been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of track 5 rather than the movement in the course of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion."

This charge was not limited to the general negligence count, but, as given, was applicable to both counts.

The court further charged the jury as follows:

"The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it (R. 187). • • • Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove" (R. 189).

This charge, also, was not limited to the general negligence count, but, as given, was applicable to both counts.

III.

Jurisdictional Statement.

This Court's jurisdiction is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1254.

The judgment is a decision as to rights, privileges and immunities specially set up or claimed by petitioner under United States Statutes, the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51-60, and the Federal Safety Appliance Act, 45 U.S.C.A. Section 2.

IV.

The Questions Presented.

The ultimate questions to be decided in this case are the following:

1. If a coupler breaks in two while in normal use, is such defect a violation of the Safety Appliance Act, and therefore negligence *per se*?

2. What is the duty of the carrier in respect to couplers? Is it bound absolutely to furnish couplers which will not break under ordinary usage?

3. In a suit grounded on a violation of the Safety Appliance Act by the breaking of a coupler, where the evidence is uncontradicted, may the trial court instruct the jury on the Safety Appliance Act by merely reading them the text of the Act, leaving to them not only its application, but its construction as well (bearing in mind that although the Act only requires couplers which will couple automatically by impact, this court has construed the Act as imposing on the railroads a positive duty to furnish safe appliances)?

4. In a suit grounded on a violation of the Safety Appliance Act through the breaking of a coupler, may counsel be permitted to argue to the jury, with the court's approval, that the only duty the railroad owed, with respect to its couplers, was the duty of ordinary care, and that if the couplers coupled automatically by impact there was no violation of the Act?

5. Where a complaint contains two charges of negligence, one based on a Safety Appliance Act violation, in that the coupler was defective and failed to remain coupled (not that it could not be coupled and uncoupled

automatically), and the other based on general negligence, may the court instruct the jury as follows, without restricting the instruction to the charge of general negligence?

> "The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it. * * * Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove."

6. Where a complaint contains two charges of negligence, one based on a Safety Appliance Act violation and the other based on general negligence, may the court instruct the jury as follows:

> "Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of the three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of track 5 rather than the movement in the course of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion."

Reasons Relied Upon for Allowance of the Writ.

Great uncertainty exists as to the proper construction and effect of the Safety Appliance Act, by reason of this court's decisions in *Minneapolis and St. L. R. Co.* v. *Got-*

schall, 244 U. S. 66; *San Antonio Ry. Co.* v. *Wagner,* 241 U. S. 476; *St. Louis, I. M. & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, and *New Orleans and N. E. R. R. Co.* v. *Scarlet,* 249 U. S. 528. This court in the *Taylor* case, in *Chicago, Burlington and Quincy Ry. Co.* v. *United States,* 220 U. S. 559, 575; *Delk* v. *St. Louis and San Francisco R. R. Co.,* 220 U. S. 580, 586, and *Texas and Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33, 43, held that the duty of the carrier to furnish cars complying with the Safety Appliance Act was absolute. In the *Gotschall* case the court referred to the positive duty to furnish safe appliances. In the *Wagner* case the court pointed out the legislative intent to treat a violation of the Safety Appliance Act as negligence *per se.* Yet in the *Scarlet* case the court held that the breaking of a king pin and coupling chains in an ordinary train movement did not establish a violation of the Boiler Inspection Act, but at most presented a question for the jury. Courts and litigants, if the instant opinion is permitted to stand, will be at a loss to know how to construe the Act.

The various Courts of Appeals have differed in their construction of the coupler provisions of the Safety Appliance Act, and in their interpretation of the *Gotschall* case. In the second and sixth circuits it has been held that the use of coupling appliances which fail to hold the cars together is a violation of the Act as a matter of law. See *Keenan* v. *Director General of Railroads,* 285 F. 286 (2nd Cir.), *certiorari* denied 261 U. S. 616; *Erie R. Co.* v. *Caldwell,* 264 F. 947 (6th Cir.), and *Reetz* v. *Chicago and E. R. Co.,* 46 F. 2d 50 (6th Cir.).

The court in the seventh circuit, on the other hand, in *Vigor* v. *Chesapeake and O. Ry. Co.,* 101 F. 2d 865, has given the Act a literal interpretation, holding that recovery under the Act may only be had if the injuries

were proximately caused by failure of the cars to couple automatically or the impossibility of uncoupling them without going between them, and that proof of an undesired uncoupling is only evidence that the cars had not been completely and effectively coupled. It is uncertain whether the same court is adhering to this interpretation in the instant case, (171 F. 2d 973) or is holding broadly that from the breaking of a coupler the jury may infer a violation of the Act. In either event, the court in this circuit takes the view that the question of violation of the Act must be left to the jury, and in effect holds that the plaintiff must prove negligence to establish such violation.

There may be uncertainty as to whether the *Gotschall* case was decided on the question of causal relation—the uncoupling of the cars having established the violation of the Act as a matter of law—or whether the uncoupling was merely evidence from which the jury were permitted to infer a violation. The former view is taken by the court in *Philadelphia & R. Ry. Co.* v. *Eisenhart,* 280 F. 271, 275, (3rd Cir.) and the latter by the Circuit Court in the instant case.

The same conflicts obtain in the State Courts. The Minnesota, Arizona and Missouri courts have held that the failure of couplers to hold the cars together establishes a violation of the Act as a matter of law. See *Kowalski* v. *C. and N. W. Ry. Co.,* 159 Minn. 388, 199 N. W. 178; *So. Pac. Co.* v. *Thomas,* 21 Ariz., 355, 188 Pac. 268 (cert. den. 255 U. S. 576) and *McAllister* v. *St. Louis Merchants' Bridge Term. Ry. Co.,* 324 Mo. 1005, 25 S. W. 2d 791. The question was left to the jury in *Stewart* v. *Wabash R. Co.,* 105 Neb. 812, 182 N. W. 496, and *Saxton* v. *D. and H. Co.,* 256 N. Y. 363. The Illinois Supreme Court, in *Woods* v. *C. B. and Q. R. R. Co.,* 306

Ill. 217, has held that the Act is to be given a narrow, literal interpretation, and that it has no relation whatever to a case in which injury results from the breaking of a coupler.

In view of the importance of the questions raised in the instant case to thousands of railroad employees all over the country, we respectfully submit that the petition herein should be granted and the Court should hold that the Safety Appliance Act imposes an absolute duty upon the carrier to provide safe coupling appliances, and that such duty is violated as a matter of law when couplers fail to hold cars together in an ordinary train movement.

The restrictive interpretation given the Safety Appliance Act by the trial court and by the Court of Appeals in the present case renders it virtually meaningless in respect of all persons other than those employees who may be injured while actually performing coupling or uncoupling operations. If the Congress intended thus to limit the requirements of the Act, its violation could not, we submit, inure to the benefit of all railroad employees or to the traveling public, as this Court has frequently held it does. If a literal compliance with the Act is all that Congress intended to require of the railroads, then they may with impunity furnish defective and insecure couplers provided they perform the preliminary function of coupling automatically. If they should break in two and wreck a train immediately after being coupled, injuring passengers or the public, no recovery could be had for a violation of the Act.

In the instant case the plaintiff has been deprived of all benefit of the Safety Appliance Act. The trial court superimposed on the plain language of the Act, and on the construction placed upon it by this court, the further requirement that the plaintiff prove that the defendant was negligent in its maintenance of the coupler. Since the plaintiff could furnish no such proof, she was unable to recover.

Prayer.

Wherefore, for the reasons above given, petitioner respectfully prays that a writ of *certiorari* be issued to the Court of Appeals for the Seventh Circuit to the end that this cause may be reviewed and determined by this court; and that the judgment of the Court of Appeals be reversed; and for such other and further relief as to the Court shall seem just.

JOSEPH D. RYAN,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No.

SARAH O'DONNELL, Administratrix of the Estate of WILLIAM O'DONNELL, Deceased,

Petitioner,

VS.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

O'Donnell v. *Elgin, Joliet & Eastern Ry. Co.*, 171 F. 2d 973.

II.

Jurisdictional Grounds.

The jurisdiction of this court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1254.

The Court of Appeals for the Seventh Circuit has rendered a final judgment interpreting the Safety Appliance Act (45 U.S.C.A., Section 2) in a manner probably not in accord with this court's decisions in *Minneapolis and St. Louis R. R.* v. *Gotschall*, 244 U. S. 66; *San Antonio Ry.* v. *Wagner*, 241 U. S. 476; *St. Louis, I. M. & Southern Ry. Co.* v. *Taylor*, 210 U. S. 281; *Chicago, Burlington and Quincy Ry. Co.* v. *United States*, 220 U. S. 559; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, and *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, and contrary to the decisions of the second circuit in *Keenan* v. *Director General of Railroads*, 285 F. 286, and the sixth circuit in *Erie R. Co.* v. *Caldwell*, 264 F. 947, and *Reetz* v. *Chicago & E. R. Co.*, 46 F. 2d 50.

There is a great divergence of judicial opinion as to the interpretation of the coupler provision of the Safety Appliance Act, and it is of fundamental importance in the administration of that Act that this court exercise its supervisory power to resolve the question and finally determine the full scope and application of the section referred to.

Statement of the Case.

The fatal accident in this case occurred in the yard of the defendant at Gary, Indiana, during the nighttime of January 9, 1946. Decedent was a switchman, a member of a crew of which his brother, Jack O'Donnell, was conductor (R. 29, 31). Shortly before the accident decedent and his brother were talking together. Decedent told his brother that he had some couplings to make on the west (or near) end of track 5 (R. 37). He then started walking down the lead toward this track (R. 79). The conductor meanwhile caused a cut of cars which was being broken up to be pulled toward the west out on

the lead. When the cars were clear of the switch leading from the storage track to the lead, the movement was stopped, the switch closed, and the cars were then pushed in an easterly direction down the lead, towards track 5 (R. 40). It was the conductor's intention to stop this cut of cars on the lead, west of track 5, uncouple and leave on this track the leading or easterly car, and then go back and put away the remaining cars, after which he would push the single car standing on the lead into track 5, couple up the cars on that track, and pull them out from the east end (R. 40). This would give the decedent time to adjust the couplers and drawbars on the cars on track 5, for which purpose he had to go between the cars (R. 38).

As the cut of cars advanced in an easterly direction on the lead, towards track 5, at a speed of about ten miles an hour (R. 43) the conductor signaled the engineer to stop (R. 40). This signal was not obeyed (R. 41). Another signal was given, which was not obeyed (R. 42). Finally the conductor gave a washout or emergency stop signal (R. 41). The cut of cars was thereupon brought to a stop, but the coupler broke in two back of the two leading cars, permitting them to impact violently against the cars standing on track 5 (R. 42, 43). The force of the collision moved the standing cars a car length or more toward the east (R. 89), and coupled up the cars standing on track 5 (R. 43, 48, 92, 93). The coupler broke at a partial fracture (R. 47, 92); the broken pieces of the coupler fell down between the tracks (R. 47).

The decedent was not missed at first, but some time later a search of the yard disclosed his body, lying close up against the north rail of track 5, badly mutilated (R. 52, 105). Between the rails of track 5, about 60 or 70 feet beyond the lead track, a safety sign was lying (R.

106). This sign was a board about two by one and a half feet, adjustable so that it could be placed upright when in use, and laid down flat when not in use (R. 61). Just at this sign decedent's lantern was lying (R. 52). In the edge of the sign a fresh chip had been knocked off (R. 54, 106). There were footmarks south of the safety sign in the center of the track (R. 54). On both sides of the rail, and proceeding eastward from the sign, there were signs of dragging, or brush marks, extending along inside of the rail for a car length or more (R. 54, 106), up to the point where the body was lying (R. 54, 106, 107, 111).

Specification of Errors to Be Urged.

The District Court Erred:

1. In refusing to hold that the use of a car with a coupler that breaks in normal use is a violation of the Safety Appliance Act, and therefore negligence *per se.*

2. In refusing to hold that a carrier is bound absolutely to furnish couplers which will not break under ordinary usage.

3. In instructing the jury literally in the language of the Safety Applicance Act, without informing them of the judicial construction placed upon that Act.

4. In instructing the jury that defendant denied that the Safety Appliance Act was applicable, and in permitting defendant's counsel to argue to the jury, over plaintiff's objection and protest, that the only duty the defendant owed, in respect of its couplers, was the duty to exercise ordinary and reasonable care, and that if the couplers coupled automatically by impact (which the evidence showed without dispute they did) there was no violation of the Act.

5. In permitting the jury to construe the Act to determine whether the use of a defective coupler was a violation of it.

6. In instructing the jury in substance that the plaintiff must prove the defendant guilty of negligence; that it is not sufficient to show that the defendant may possibly have been guilty of negligence, but that the evidence must point to that fact; and that if the evidence is uncertain the jury have no right to guess between various causes and find that the negligence of the defendant was the proximate cause of the accident if there is no satisfactory foundation in the evidence for such conclusion.

7. In instructing that the mere happening of an accident does not in and of itself create a liability; that the happening of the accident carries with it no presumption of negligence, but that is an affirmative fact which the plaintiff must prove.

Summary of the Argument.

The Safety Appliance Act makes it mandatory on the carrier to provide couplers that will not break in normal use; breaking of a coupler in normal use is a violation of that Act, and negligence *per se*, and the jury should have been so instructed.

The court erroneously left to the jury the decision of a purely legal question, *viz.*, the construction of the Safety Appliance Act.

The court gave misleading instructions, telling the jury the plaintiff must prove the defendant guilty of negligence. These instructions were manifestly inapplicable to plaintiff's claim under the Safety Applicance Act, but the jury were not advised of this distinction, and undoubt-

edly believed that the plaintiff must prove the defendant committed actual negligence in the maintenance of the coupler. The effect of the court's ruling on instructions, and the defendant's argument to the jury, was to deprive the plaintiff of all benefit of the Safety Appliance Act.

ARGUMENT.

The Safety Appliance Act makes it mandatory on the carrier to provide couplers that will not break in normal use; breaking of a coupler in normal use is a violation of that Act, and negligence per se, and the jury should have been so instructed.

The coupler provision of the Safety Appliance Act requires the carrier to furnish couplers which couple automatically by impact, and which can be coupled without the necessity of men going between the ends of the cars.

In *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 295, this court said that:

> "The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just,"

The qualified duty which the court mentions, as theretofore existing, obviously was the duty to exercise reasonable care in the maintenance of the appliances. This duty was made absolute.

In the case of *C. B. & Q. Ry. Co.* v. *United States*, 220 U. S. 559, this court adhered to the doctrine announced in the *Taylor* case, and stated that the question was not open to further discussion (p. 577). Notwithstanding this pronouncement, an attempt was made in *San Antonio Ry.* v. *Wagner*, 241 U. S. 476, to induce the court to qualify the construction theretofore placed upon the Act. This the court refused to do, saying that:

> "• • • it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se*." (p. 484).

In *Minneapolis & St. L. R. Co.* v. *Gotschall*, 244 U. S. 66, 67, in which an unintended separation of couplers gave rise to an accident, the court stressed "the positive duty imposed by the statute [Safety Appliance Act] upon the railroad to furnish *safe* appliances for the coupling of cars." (Our italics.)

From these decisions, it is clear that this court has construed the Safety Appliance Act as embracing these two propositions:

a. Not only must the couplers couple automatically, but they must be *safe* and operate efficiently.

b. A failure to meet either of the above requirements is negligence *per se*.

It is our contention that the breaking of the couplers in this case was a violation of the Safety Appliance Act and therefore negligence *per se*, and that the trial court should have so instructed the jury. In failing so to instruct, the trial court deprived plaintiff of all benefit of the Act, as we will show hereafter.

In the following cases, a breaking or unintended separation of couplers was held or conceded to prove a violation of the Act as a matter of law; *Keenan* v. *Dir. Gen.*, 285 F. 286 (2d Cir.); *Erie R. Co.* v. *Caldwell*, 264 F. 947 (6th Cir.); *Reetz* v. *Chicago and E. R. Co.*, 46 F. 2d 50 (6th Cir.); *Kowalski* v. *C. & N. W. Ry. Co.*, 159 Minn. 388, 199 N. W. 178; *So Pac. Co.* v. *Thomas*, 21 Ariz. 355, 188 P. 268 (cert. den. 255 U. S. 576) and *McAllister* v. *St. Louis Merchants' Bridge Term. Ry. Co.*, 324 Mo. 1005, 25 S. W. 2d 791.

It is true that, in many cases, whether there has been a violation of the Act may be a question of fact, and therefore require submission to the jury. Such cases as those where a coupling appliance is claimed to have failed,

when it worked perfectly before and after the accident, are illustrations. But no such question arose here. This coupler broke squarely in two, along the line of a partial fracture, on an ordinary switching movement, when the train was stopped suddenly while moving only ten miles an hour, and the broken parts fell down between the rails and lay there. In this situation, what possible factual question as to the Act was there for the jury to decide, other than the question of causal relation? No one could reasonably contend that this was a safe coupler. Sudden stops at low speeds during switching movements are a common occurrence, and the strain thereby imposed upon couplers is one they are designed to withstand, with a considerable margin of safety. There can be no doubt that in the instant case the strain was well within normal limits, since the coupler was subjected only to the force imparted by the momentum of two cars and since no other coupler broke. The breaking of the coupler clearly established a violation of the Act.

Neither the defendant, nor the trial or Circuit Court, has suggested any possible reason that could be advanced to support a finding that the coupler in question was not defective, and we submit that none could be suggested.

The positive duty to provide couplers that will not break during ordinary use is implicit in the Act. If the duty were limited to the specific requirements of the Act it would rarely inure to the benefit of employees other than those engaged in coupling or uncoupling operations, or to the benefit of the traveling public. It was the intention of Congress, in enacting the Safety Appliance Act, to give broad protection to railroad employees and to the public against the consequences of the use of defective

equipment, and this purpose would be defeated by a narrow interpretation of the coupler provisions. Under such an interpretation, no matter how defective couplers might be, their use would not be in violation of the Act so long as they coupled automatically, and although they might break and wreck a train, an injured employee or passenger would be denied the protection of the Act.

This Court has rejected any such narrow interpretation of the Act in the *Gotschall* case, as well as in the more recent cases of *Fairport R. Co.* v. *Meredith*, 292 U. S. 589, and *Coray* v. *Southern Pacific Co.*, 335 U. S. 520. Its recognition of the positive duty to furnish safe coupling appliances is clear and unequivocal and calls for an instruction as a matter of law in every case in which there can be no rational contention that the appliance was safe. While the question was left to the jury in the *Gotschall* case, that case involved a separation of new couplers, and men might reasonably disagree as to their condition, but in the instant case, where the coupler broke in two, there is no room for such disagreement.

The Court of Appeals, in its opinion, declared that the true rule to be applied was that the jury might, "if they think it reasonable under all the circumstances, infer that the coupler was defective and was furnished and used in violation of the Act." This seems to us an unsound statement. If the jury are given the privilege of inferring that a coupler which breaks in two under ordinary usage does not comply with the Act, then conversely, under the same circumstances, they may also infer that the same coupler complies with the Act. This conclusion would fly in the face of the Act, the decisions construing it, and the humanitarian purposes it was designed to accomplish.

The District Court instructed the jury in the language of the Act itself (R. 186), telling them that the couplers

furnished must couple automatically by impact, without the necessity of men going between the ends of the cars. As given, the charge was utterly foreign to any of the issues of the case. Nobody claimed that the coupler which broke did not couple automatically prior to the accident; the act of coupling had nothing to do with our case. What conclusion could the jury possibly draw from this portion of the charge? It seems inescapable that they decided that the Act had not been violated. Certainly they would never suspect from anything the court told them that a coupler which broke might be furnished in violation of the Act.

This was exactly the argument which counsel for the defendant made to the jury, over our objection, but with the court's approval. Counsel argued as follows (R. 158):

> "The law does not say anything whatever about couplers which break, and I think after you hear Judge Campbell's instructions as to what the law is you will conclude that the requirements of the law, so far as a coupler breaking is concerned, is that the railroad company must use ordinary and reasonable care. There is not a word of evidence here that there was anything about the condition of this coupler which could have caused anyone to believe that it was at all likely that it would break. So I say if that is the law you must necessarily find that there has been no proof here that the railroad company was negligent as concerns that coupler."

And this in the face of the pronouncements of this court that the duty is absolute to provide safe coupling appliances, and a violation of this duty is negligence *per se*!

We objected to this line of argument, but our objection was overruled (R. 159).

In *Brady* v. *Terminal R. R. Assn.*, 303 U. S. 10, 15, the court said that the duty imposed is not based on

negligence, but is absolute, and "the carrier is not excused by any showing of care however assiduous."

So we see that the court not only failed to instruct the jury that the breaking of the coupler was a violation of the Safety Appliance Act and negligence *per se*, but approved an argument which told the jury that the Act did not apply at all, and that the defendant need only exercise ordinary care.

The ruling of the court on the instructions and the argument deprived the plaintiff of all benefit she might hope to derive from the Safety Appliance Act, and stripped it of its meaning so far as this case was concerned. If the Act had never been passed, the jury might still have inferred negligence from the breaking of the coupler. The common law raised a "qualified duty" of ordinary care in this situation; and under the principle of *res ipsa loquitur* the breaking of the coupler in itself might be sufficient to take the plaintiff's case to the jury. *Jesionowski* v. *Boston & M. R. Co.*, 329 U. S. 452; *Johnson* v. *United States*, 333 U. S. 46. The situation would have been no different had the court dismissed the Safety Appliance Act count at the conclusion of plaintiff's evidence.

The court erroneously left to the jury the decision of a purely legal question, viz., the construction of the Safety Appliance Act.

The breaking of the coupler was not in dispute. There was no factual question (except causal relation) for a jury to decide. The facts being admitted, their effect was a question of law. When the court instructed the jury in the language of the Act, and left it to them to construe the Act, he was asking the jury to decide a question of

law. How were the jury to know that this court had construed the Act to require the carrier to furnish safe and efficient couplers?

In one portion of his charge the Court told the jury that if they believed "that the defendant, at the time and place in question, used and operated a car with a defective coupler, contrary to the provisions of the Federal Safety Appliance Act, and that said coupler broke, and that as a direct and proximate result thereof, the plaintiff's decedent sustained injuries which resulted in his death, then you *may* find the defendant guilty." (Italics ours.) (R. 188). The jury is here required to find four things: (1) that defendant used a defective coupler; (2) that such use was contrary to the Act; (3) that the coupler broke; and (4) proximate cause. The jury is not only required to find that the coupler was defective—as to which there could be no rational dispute—but that its use was contrary to the statute. They are told that if they so find, and also decide the other two prerequisites in favor of plaintiff, they may, but are not required to, find the defendant guilty. The jury are given the improper task of construing the Act—deciding a question of law—but in view of the Court's having read to them the literal language of the Act and told them the statute required the defendant to furnish that kind of couplers, (R. 186) without also telling them that the Act also required defendant to furnish safe coupling appliances—it is perfectly clear that the jury would construe the Act literally.

The court gave misleading instructions, telling the jury the plaintiff must prove the defendant guilty of negligence. These instructions were manifestly inapplicable to plaintiff's claim under the Safety Appliance Act, but the jury were not advised of this distinction, and undoubtedly believed that the plaintiff must prove the defendant committed actual negligence in the maintenance of the coupler.

In addition to requiring the jury to decide whether the coupler was defective, and to construe the statute, they were told that the plaintiff had to prove negligence. This requisite was not confined, as it should have been, to the first charge of negligence, but applied as well to the charges of violations of the Safety Appliance Act. No one can read the Court's charge as a whole without reaching the conclusion that any jury being so instructed would understand that plaintiff had to prove a want of ordinary care in the maintenance of the coupler. After telling them what the allegations of the complaint and answer were, the Court said (R. 185):

> "Now, you will recall from reading of the pleadings that there are three acts of negligence charged by the plaintiff. The first, may we say, is more or less a general violation of the Federal Employers' Liability Act. The third gives the specific violations of the Federal Safety Act with reference to couplers. Those are the three acts of negligence that the plaintiff charges, and the defendant denies them, and also sets up contributory negligence."

A little later (R. 187) he said:

> "The mere happening of an accident by which the plaintiff's intestate or plaintiff's decedent lost his life does not in and of itself create a liability upon the defendant to pay for it. They have to meet their burden of proof which I will attempt to define to you a little further on. You must first establish

that the defendant is liable. So that when you go to the jury room for the consideration of this case you must first determine whether or not the defendant is guilty of one or more or all of these acts of negligence to which I have just referred. • • •

"Now, she must further prove that such negligence of the defendant was the proximate cause of the death of the decedent in this case. • • •"

"Now, I have used some terms here that I think I ought to explain to you. First of all, negligence: Negligence is perhaps most easily defined as the doing of something which an ordinarily reasonably, prudent man or woman would not have done under similar or like circumstances, or the failure to do something which an ordinarily reasonably prudent man or woman under like or similar circumstances would have done" (A. 188).

Then comes the portion of the charge above referred to requiring the jury to construe the Act, which is immediately followed, at R. 189, by this:

"Now, as I have told you in the beginning, the fact of an accident carries with it no presumption of negligence on the part of the defendant. That is an affirmative fact for the plaintiff to prove. Plaintiff must prove that the defendant has been guilty of negligence as alleged in the plaintiff's complaint, one of these three things that I have been enumerating to you. It is not sufficient for the plaintiff to show that the defendant may possibly have been guilty of negligence. The evidence must point to the fact that it was guilty of such negligence, and if you believe from all of the testimony that the matter is uncertain and it shows that William O'Donnell may have been killed in the course of the final movement of cars out of Track 5 rather than the movement in the course of which the coupler broke, you have no right to guess between these various causes and find that the negligence of the defendant

was the proximate cause of the accident if there is no satisfactory foundation in the testimony for that conclusion.

"The burden of proof is not upon the defendant to show that it is not guilty of any of the specific acts of negligence charged, but the burden is upon the plaintiff to show by a greater weight or preponderance of the evidence that the defendant is guilty as charged in the complaint."

There can be no doubt that the court's reiteration and emphasis of its charge that the burden is upon plaintiff to prove negligence, and the defendant's argument, over our objection and with the Court's approval, that so far as a coupler breaking is concerned, the railroad must use ordinary and reasonable care and that since there was nothing about the coupler that would lead anyone to believe it was likely to break there was no proof that the railroad was negligent in respect to that coupler, necessarily led the jury to believe that plaintiff had to prove a failure to exercise ordinary care in its maintenance.

This portion of the Court's charge is also erroneous in confusing causal relation with negligence, and in admonishing the jury that they cannot guess between various causes and find the defendant's negligence the proximate cause of the accident if there is "no satisfactory foundation in the testimony for that conclusion". The court in effect denied them the right to draw legitimate inferences from the evidence and invited them to find that there was no satisfactory foundation for a verdict for the plaintiff.

The instructions here criticized are much more confusing and erroneous than those which caused a reversal in *Zumwalt* v. *Gardner*, 160 F. 2d 298, where the court, while conceding that a Safety Appliance Act instruction

was correct in part (which cannot be conceded here), held that interspersed references to negligence rendered the instruction as a whole misleading, and necessitated a new trial.

These instructions, well calculated to mislead the jury, are of the type condemned in *Cummings* v. *Pennsylvania* R. Co., 45 F. 2d 152, 153, wherein the jury is "left to take its choice between two inconsistent statements of the law, one of which was wrong and one right." This court reversed the case of *Deserant* v. *Cerillos Coal R. Co.*, 178 U. S. 409, 420, which was based on the Miners' Safety Act, because the trial court in instructing the jury, ignored the obligations imposed by the statute, made the duty of the mine owner relative, not absolute, and its test what a reasonable person would do, instead of the command of the statute. That is precisely what occurred here. This court has held, in *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82, and in *McCandless* v. *United States*, 298 U. S. 342, 347, 348, that erroneous rulings are presumptively injurious, and are ground for reversal unless it affirmatively appears that they were harmless.

It will undoubtedly be urged that we failed to object specifically to the instructions which we now criticize. This is not true; we told the court, first, that we did not believe he had made it plain that a violation of the Safety Appliance Act was in and of itself negligence (R. 193). To this the court replied that he thought he had done very well (R. 193). We then amplified our objection, and went on to object to that part of the charge which was concerned with the "mere accident" theory (R. 194). Our whole argument was based on the repeated decisions of this court that a violation of the Safety Appliance Act is negligence *per se;* and our objection neces-

sarily applied to any part of the charge inconsistent with this rule. Furthermore, we submitted this in our proposed instructions Nos. 5, 6, 7 and 8 (R. 261, 262) which the court declined to give.

In the requests noted, we asked the court to instruct that the breaking of the coupler established a violation of the Act as a matter of law; we also asked the court, in request No. 4 (R. 261) to tell the jury it was defendant's absolute duty to provide couplers that would remain coupled. The subject was thoroughly covered.

We objected specifically to the defendant's argument that the br aking of a coupler was not a violation of the Safety Appliance Act, but our objection was brushed aside (R. 159).

Indeed, the court peremptorily refused to permit us to discuss the instructions prior to the time they were given, so that we would know how to argue our case, saying (R. 144):

"We will not discuss the instructions. I will instruct the jury."

In his argument to the jury counsel for the defendant stated (R. 156):

> "The law says that Mrs. O'Donnell must prove that her husband was killed by the fault or negligence of the railroad company, and the law says that unless she proves that to your satisfaction she can receive nothing."

Counsel for defendant (R. 158) repeated the specific language of the statute which required the railroads to furnish couplers that could be coupled and uncoupled automatically by impact without the necessity of men going between the ends of the cars; then asserted that "Judge Campbell's instructions • • • so far as a coup-

ler breaking is concerned, is that the railroad company must use ordinary and reasonable care"; that there was no proof "which could have caused anyone to believe that it was at all likely that it would break" or that the defendant "was negligent as concerns that coupler"; that (R. 158, 159) the car in question "did couple automatically by impact when the engine tied on to the cars on track 2" * * *. Our objection to this argument (R. 159) was overruled, the Court remarking: "You will have a chance to protest when you answer him. Go ahead with your argument." Immediately following the above ruling, counsel for defendant further stated (R. 159):

> "So far as that car is concerned, ladies and gentlemen, when you listen to Judge Campbell's instructions, listen and see if he doesn't tell you that this is the test of a violation of the coupler provision of the Safety Appliance Act and if that is what he tells you is the test, then necessarily you must find that this car met that test because in neither one of those respects is there a word of evidence here as to any failure of that car to function in the two respects that the statute requires."

The Court instructed precisely as counsel predicted quoting the statute literally, then admonished the jury (Tr. 186):

> "That is the statute. Now, that statute places upon the railroad engaged in the type of business that this railroad was engaged in at the time of this occurrence an absolute duty to provide the couplers which I have just read to you from the statute, and to provide them in such order as the statute indicates."

The defendant denied specifically that the Safety Appliance Act applied to the movement which resulted in decedent's death, and also specifically denied that the coupler failed to comply with the provisions of the Act

(R. 14). This defense was read to the jury by the court (R. 185). Since the evidence was undisputed, these defenses were nothing more than conclusions of law. Obviously, if the Act was not applicable, or did not require the defendant to do more than furnish cars which would couple automatically by impact, the charge contained in Paragraph (c) of plaintiff's complaint, (R. 13) (alleging that the defendant violated the Act by furnishing a car with a coupler so "defective and insecure that it broke loose" from the car to which it was attached) failed to state a cause of action, and its legal sufficiency could and should have been tested by motion to strike. This the defendant failed to do and the question whether the Act was violated was treated as one of fact for the determination of the jury. We submit that the defendant, in the circumstances, is estopped from questioning the sufficiency of the allegations, as above set forth. The action of the trial court in giving the jury *carte blanche* to construe the statute and pass upon the legal question involved is without precedent.

Moreover, it is quite obvious that if the statute were inapplicable to the movement involved and the breaking of the coupler, under the undisputed evidence in this case, did not prove a violation of the Act or come within its purview, then the jury should not and could not be permitted to infer that the breaking of the coupler violated the Act.

In the absence of an instruction directing the jury relative to the positive duty imposed on the defendant to furnish safe and efficient couplers and the legislative intent to treat a violation of the Act as negligence *per se*, the jury had no alternative (under the court's instructions that the Act required the defendant only to furnish

couplers that could be coupled and uncoupled automatically by impact) but to find that the Act had not been violated.

The respondent will undoubtedly rely on *New Orleans R. R. Co.* v. *Scarlet*, 249 U. S. 528, as did the Court of Appeals. That case, which arose under the Boiler Inspection Act, has never been followed or cited by this court. It is inconsistent with the interpretation of the Safety Appliance Act as announced by this court in numerous cases, and we submit that, in the light of the more recent cases, and the current trend in judicial decisions, the case should be re-examined.

This court's decision in the *Scarlet* case could well be sustained on the ground that the lower court in that case held the Mississippi "Prima Facie Act" applicable; whereas of course, this court has consistently held that no state act may be availed of as a substantive ground of recovery where the Safety Appliance Act is involved. The language of the court about the breaking of the king-pin not establishing as a matter of law that it was defective, was not necessary to the decision.

Conclusion.

Petitioner therefore urges that the writ prayed for in the petition be issued; that the decision of the Court of Appeals for the Seventh Circuit be reviewed by this court, its judgment reversed and this cause be remanded with directions for a new trial.

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